OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 8, 2003

Mr. Don Rogers
Communications Director
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR2003-4687

Dear Mr. Rogers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183881.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request for information relating to deaths since January 1, 2001, of persons residing in facilities operated by or under contract with the department. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.[1]

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. You claim that all of the submitted information (labeled as Exhibits B through E) is not subject to release under the regulations promulgated pursuant to the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and that the information is therefore excepted from disclosure under section 552.101 of the Government Code in conjunction with these regulations.[2] At the direction of Congress, the Secretary of Health and Human Services ("HHS") promulgated regulations setting privacy standards for medical

[1]This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the department to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

[2]We note that a federal statute or an administrative regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101. *See* Open Records Decision No. 476 (1987) (addressing statutory predecessor).

records, which HHS issued as the Federal Standards for Privacy of Individually Identifiable Health Information. *See* Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-2 (Supp. IV 1998) (historical & statutory note); Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. Pts. 160, 164; *see also* Attorney General Opinion JC-0508 at 2 (2002). These standards govern the releasability of protected health information by a covered entity. *See* 45 C.F.R. Pts. 160, 164.

Under the federal standards, a covered entity may not use or disclose protected health information, except as provided by parts 160 and 164 of the Code of Federal Regulations. *See id.* § 164.502(a). Section 160.103 of title 45 of the Code of Federal Regulations defines a covered entity as a health plan, a health clearinghouse, or a health care provider that transmits any health information in electronic form in connection with a transaction covered by subchapter C, subtitle A of title 45. *See id.* § 160.103. You inform this office that the department is a covered entity under section 160.103, by virtue of being a health care provider and because the department administers the Medicaid program and thus comes within the definition of health plan under section 160.103. Therefore, we will next determine whether the submitted information is protected health information under the federal law.

Section 160.103 of title 45 of the Code of Federal Regulations defines the following relevant terms as follows:

> Health information means any information, whether oral or recorded in any form or medium, that:
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> > (1) Is created or received by a health care provider, health plan, public health authority, employer, life insurer, school or university, or health clearinghouse; and
> >
> > (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.
>
> 45 C.F.R. § 160.103. Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:
>
> > (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
> >
> > (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and

> (i) That identifies the individual; or
>
> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

Id. Protected health information means individually identifiable health information:

(1) Except as provided in paragraph (2) of this definition, that is:

> (i) Transmitted by electronic media;
>
> (ii) Maintained in electronic media;
>
> (iii) Transmitted or maintained in any other form or medium.

Id. You assert that Exhibits B through E contain protected health information. Upon review of the information in question, we agree that it constitutes protected health information under HIPAA. With regard to this information, however, we note that a covered entity may use protected health information to create information that is not individually identifiable health information, i.e., information that has been de-identified. *See id.* § 164.502(d)(1). The privacy standards that govern the uses and disclosures of protected health information under HIPAA do not apply to information that has been de-identified in accordance with sections 164.514(a) and (b) of the Code of Federal Regulations. *See id.* § 164.502(d)(2).[3]

Under HIPAA, a covered entity may determine that health information is not individually identifiable only under certain circumstances. One method requires a person with specialized knowledge of generally accepted statistical and scientific principles and methods for rendering information de-identifiable to apply and document such methods and principles to determine that release of protected health information would result in a very small risk of individual identification. *See id.* § 164.514(b)(1). The other method requires the covered entity to meet the following two criteria: (1) remove specific identifiers, including but not limited to names, dates directly related to an individual, telecommunication numbers, vehicle identifiers, and any other unique identifying number, characteristic, or code, and (2) have no actual knowledge that the information could be used alone or in combination with other information to identify an individual who is a subject of the information. *See id.* § 164.514(b)(2)(i), (ii). We have marked the specific identifiers in the submitted protected health information. *See id.* § 164.514(b)(2)(i)(A)-(R). To the extent that the department has no actual knowledge that the de-identified information could be used alone or in combination

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[3]We note that a covered entity must comply with the requirements of subpart E of part 164 of title 45 of the Code of Federal Regulations with respect to the protected health information of a deceased individual. *See* 45 C.F.R. § 164.502(f).

with other information to identify the subject of the health information, the department must withhold the types of information that we have marked in Exhibits B through E under section 552.101 of the Government Code in conjunction with HIPAA. However, if the department has actual knowledge that the de-identified information could be used alone or in combination with other information to identify the subject of the health information, then the department must withhold Exhibits B through E in their entirety under section 552.101 of the Government Code in conjunction with HIPAA.

The department also contends that the submitted information is confidential under section 552.101 in conjunction with Texas statutory law. Because HIPAA may not require the department to withhold all of the submitted information, we also must consider the applicability of the state statutory provisions on which the department relies. We note that HIPAA generally preempts a contrary provision of state law. *See* 45 C.F.R. § 160.203. For purposes of HIPAA, "contrary" means the following:

> (1) A covered entity would find it impossible to comply with both the State and federal requirements; or
>
> (2) The provision of State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of part C of title XI of the Act or section 264 of Pub. L. 104-191, as applicable.

Id. § 160.202. The department contends that the submitted information is made confidential under provisions of the Health and Safety and Occupations Codes, including sections 161.032, 595.001, and 611.002 of the Health and Safety Code and portions of the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. As discussed below, sections 161.032 and 595.001 of the Health and Safety Code are applicable to some of the information that we have de-identified under HIPAA. We find that it is not impossible for the department to comply with both HIPAA and sections 161.032 and 595.001. We likewise find that sections 161.032 and 595.001 do not stand as obstacles to the accomplishment and execution of the full purposes and objectives of HIPAA. As for section 611.002 of the Health and Safety Code and the MPA, as discussed below, these provisions of state law are not applicable to any of the de-identified information that is not otherwise encompassed by sections 161.032 and 595.001 of the Health and Safety Code. Therefore, we do not determine here whether HIPAA pre-empts either section 611.002 of the Health and Safety Code or the MPA.

Section 161.032 of the Health and Safety Code provides that " [t]he records and proceedings of a medical committee are confidential[,]" Health & Safety Code § 161.032(a), and that "[r]ecords, information, or reports of a medical committee [or] medical peer review committee . . . are not subject to disclosure under Chapter 552, Government Code." *Id.* § 161.032(c). For the purposes of section 161.032, a "medical committee" includes any committee, including a joint committee, of a hospital or extended care facility, as well as a

committee appointed ad hoc to conduct a specific investigation or established under state or federal law or rule or under the bylaws or rules of the organization or institution. *Id.* § 161.031(a)-(b); *see also id.* § 161.0315 (providing that governing body of hospital or extended care facility may form medical peer review committee, as defined by Occ. Code § 151.002, or medical committee, as defined by Health and Safety Code § 161.032, to evaluate medical and health care services). Section 161.032 also provides, however, that "[t]his section and Subchapter A, Chapter 160, Occupations Code, do not apply to records made or maintained in the regular course of business by a hospital, health maintenance organization, medical organization, university medical center or health science center, hospital district, hospital authority, or extended care facility." *See id.* § 161.032(f); *see also Memorial Hosp.-the Woodlands v. McCown,* 927 S.W.2d 1, 11 (Tex. 1996) (stating that records should be accorded same treatment under both Health and Safety Code § 161.032 and Occ. Code § 160.007 in determining whether they were made in regular course of business).[4] The phrase "records made or maintained in the regular course of business" has been construed to mean records that are neither created nor obtained in connection with a medical committee's deliberative proceedings. *See Memorial Hosp.-the Woodlands*, 927 S.W.2d at 9-10 (discussing *Barnes v. Whittington*, 751 S.W.2d 493 (Tex. 1988), and *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644 (Tex. 1985)).[5]

You assert that Exhibits B, C, and D contain information that is made confidential under section 161.032 of the Health and Safety Code. You inform us that Exhibits B and C relate to the proceedings of death review committees of facilities of the department. *See also* 25 T.A.C. ch. 405 subch. K (rules governing death review committees); Open Records Decision No. 595 (1991) (determining whether Fort Worth State School's death review committee qualified as medical peer review committee). You state that the remaining information in Exhibit B was created or obtained in connection with the deliberations of a death review committee and does not constitute records made or maintained in the regular course of business. You also inform us that except for the last two pages, the remaining information in Exhibit C is part of the reports of death review committees. You further explain that the remaining information in Exhibit D relates to a root cause analysis investigation that was triggered by a sentinel event report of a death of a patient at a facility of the department. Having considered your arguments and reviewed the information in question, we conclude that most of the remaining information in Exhibits B and C and all of the remaining information in Exhibit D is confidential under section 161.032 of the Health and Safety

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[4]Section 160.007 of the Occupations Code provides in part that "each proceeding or record of a medical peer review committee is confidential, and any communication made to a medical peer review committee is privileged." Occ. Code § 160.007(a); *see also id.* § 151.002(a)(7)-(8) (defining "medical peer review" and "medical peer review committee" for purposes of Medical Practice Act, subtitle B of title 3 of Occupations Code).

[5]Both *Barnes* and *Jordan* relied on the statutory predecessor to section 161.032 of the Health and Safety Code, section 3 of article 4447d, Vernon's Texas Civil Statutes, which provided in part that "records made or maintained in the regular course of business" were not confidential.

Code. The information that is confidential under section 161.032, which we have marked, is therefore excepted from disclosure under section 552.101 of the Government Code.

You contend that the remaining information in Exhibit B is confidential under section 595.001 of the Health and Safety Code. Section 595.001 provides that

> [r]ecords of the identity, diagnosis, evaluation, or treatment of a person that are maintained in connection with the performance of a program or activity relating to mental retardation are confidential and may be disclosed only for the purposes and under the circumstances authorized under Sections 595.003 and 595.004.

Health & Safety Code § 595.001; *see also* Open Records Decision No. 595 (1991) (statutory predecessor encompassed records of death of client at residential facility of department). You state that the remaining information in Exhibit B relates to an individual who was a resident of a facility of the department. Based on your representations and our review of the information in question, we conclude that the remaining information in Exhibit B is confidential under section 595.001 of the Health and Safety Code. Therefore, that information also is excepted from disclosure under section 552.101 of the Government Code.

You contend that Exhibit C contains information that is confidential under section 611.002 of the Health and Safety Code, which provides in part:

> (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
>
> (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Health & Safety Code § 611.002(a)-(b). Section 611.001 defines a "professional" as (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. *See id.* § 611.001(2). You inform us that Exhibit C contains information created by professionals. You have not demonstrated, however, that any of the remaining information in Exhibit C consists of either a communication between a patient and a professional or a record of the identity, diagnosis, evaluation, or treatment of a patient that was created or is maintained by a professional. *See id.* § 611.002(a). We therefore conclude that none of the remaining information in Exhibit C is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 611.002 of the Health and Safety Code.

You also contend that Exhibit C contains information that is subject to the MPA. The MPA governs the disclosure of medical records. Section 159.002 of the MPA provides in part:

> (a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.
>
> (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

Occ. Code § 159.002(a)-(b). In this instance, the department has not demonstrated that any of the remaining information in Exhibit C consists of either a communication between a physician and a patient or a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that was created or is maintained by a physician. We therefore conclude that the MPA is not applicable to any of the remaining information in Exhibit C.

In summary, to the extent that the department has no actual knowledge that the de-identified information in Exhibits B through E could be used alone or in combination with other information to identify the subject of the information, the department must withhold the information that we have marked in Exhibits B through E under section 552.101 of the Government Code in conjunction with HIPAA. If the department has actual knowledge that the remaining information in Exhibits B through E could be used alone or in combination with other information to identify the subject of the information, then the department also must withhold the remaining information in Exhibits B through E under section 552.101 in conjunction with HIPAA. If HIPAA does not require the department to withhold all of the information in Exhibits B through E, then the department must withhold both the marked information in Exhibits B through E that is confidential under HIPAA and the other marked information in Exhibits B, C, and D that is confidential under section 552.101 of the Government Code in conjunction with sections 161.032 and 595.001 of the Health and Safety Code. If HIPAA does not require the withholding of the remaining information in Exhibits C and E, then the department must release that information. As we are able to make these determinations, we need not address your other arguments against disclosure.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 183881

Enc: Submitted documents

c: Mr. David Mann
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(w/o enclosures)